

Submission
No 85

INQUIRY INTO MODERN SLAVERY ACT 2018 AND ASSOCIATED MATTERS

Organisation: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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The Hon Shayne Mallard MLC
Chair, Standing Committee on Social Issues
Legislative Council, Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

By email: socialissues@parliament.nsw.gov.au

Dear Mr Mallard,

Modern Slavery Act 2018 and associated matters

Thank you for the opportunity to provide a submission to the Legislative Council Standing Committee on Social Issues inquiry into the *Modern Slavery Act 2018* (NSW) and associated matters ("the Inquiry").

When the Modern Slavery Bill 2018 (NSW) was introduced to the Legislative Assembly in May 2018, the Law Society noted that the interaction between the NSW bill and the proposed federal modern slavery law may require consideration.¹ We are pleased that the Inquiry provides an opportunity for potential inconsistencies between the NSW and federal laws to be identified and addressed.

The Law Society's submission is informed by its Human Rights, Business Law, Criminal Law and Government Solicitors Committees. We would also like to acknowledge the input of the Law Council of Australia with regard to the interaction between the *Modern Slavery Act 2018* (NSW) ("NSW Act") and the *Modern Slavery Act 2018* (Cth) ("Commonwealth Act") and the application of the NSW anti-slavery scheme to charities and not-for-profit organisations.

1. General observations

Modern slavery is a transnational crime that affects some of society's most vulnerable people. The prohibition of slavery is one of the few norms under international law with *jus cogens* status, with no derogation permitted.² It is proscribed under various international treaties including the *International Convention to Suppress the Slave Trade and Slavery* (ratified by Australia in 1927), the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (ratified by Australia in 1958), and the *Worst Forms of Child Labour Convention* (ratified by Australia in 2006). In federal domestic law, slavery and trafficking are prohibited by divisions 270 and 271 of the *Criminal Code Act 1995* (Cth). The *Proceeds of Crime Act 2002* (Cth) includes provisions for tracing

¹ Letter from the Law Society of NSW to the Hon Gladys Berejiklian MP, 17 May 2018.

² David Weissbrodt and Michael Dottridge, *Abolishing Slavery and its Contemporary Forms* (2002), Office of the United Nations High Commissioner for Human Rights, HR/PUB/02/4, 6. Available at: <https://www.ohchr.org/documents/publications/slaveryen.pdf>

and confiscating proceeds of trafficking and slavery. Under NSW law, the *Crimes Act 1900* (NSW) provides offences relating to sexual servitude.

Despite these legal prohibitions under national and international law, over 40 million people live in modern slavery today.³ Estimates of the number of people in modern slavery in Australia vary from 1,300⁴ to 15,000.⁵ The Australian Institute of Criminology further estimates that there are approximately four undetected victims for every victim detected.⁶

As part of a human-rights based response to the problem, the Law Society supports transparency in supply chain legislation.⁷ In this regard, we note that the NSW Legislative Council Select Committee on Human Trafficking in New South Wales stated in its October 2017 report “[a]ddressing human trafficking and slavery in the supply chain is an important issue as Australian businesses are highly integrated with supply chains across Asia, including high risk countries such as Thailand, India, Bangladesh and Malaysia.”⁸ Transparency in supply chain legislation has, in the UK context, been found to contribute to enhanced due diligence processes⁹ and led to an increase of over 50% in communication between companies and their suppliers on actions to address modern slavery.¹⁰

2. The operability of the proposed anti-slavery scheme

The proposed anti-slavery scheme encompasses the *Modern Slavery Act 2018* (NSW) (“the NSW Act”), draft *Modern Slavery Regulations 2019* (“draft regulations”) and draft *Modern Slavery Amendment Bill 2019* (“draft amendment bill”). The objects of the anti-slavery scheme are set out at s 3 of the NSW Act, and include combating modern slavery, providing assistance and support for victims and raising public awareness on the issue.¹¹ The draft regulations provide direction as to the reporting requirements under the Act, and the draft amendment bill seeks to “ensure that the NSW Act better aligns with the policy intent behind it, and will enhance the legal clarity, constitutionality and operation of the NSW Act”.¹²

The NSW anti-slavery scheme incorporates provisions similar to those in the UK’s *Modern Slavery Act 2015* and the Commonwealth Act, while also including some novel features, notably a minimum reporting threshold of \$50 million annual turnover for commercial organisations, and penalties of up to \$1.1 million for non-compliance. The anti-slavery scheme includes several key provisions to fulfil the objectives of the NSW Act, including:

- establishment of an Anti-Slavery Commissioner;¹³

³ International Labour Organisation and the Walk Free Foundation, *Global estimates of modern slavery: Forced labour and forced marriage* (Geneva: 2017), 5.

⁴ Australian Institute of Criminology, ‘Estimating the dark figure of human trafficking and slavery victimisation in Australia’ (February 2019), *Statistical Bulletin* 16, 2. Available at: <https://aic.gov.au/publications/sb/sb16>

⁵ Walk Free Foundation, *Global Slavery Index 2018: Country Study, Australia* (2018). Available at: <https://www.globalslaveryindex.org/2018/findings/country-studies/australia/>

⁶ Australian Institute of Criminology, above n 4.

⁷ The Law Society of NSW, ‘Inquiry into Human Trafficking’, Submission to the NSW Legislative Council Select Committee on human trafficking’, 22 February 2017, 6.

⁸ NSW Legislative Council Select Committee on Human Trafficking, *Human trafficking in New South Wales* (October 2017), 26.

⁹ Business and Human Rights Resource Centre, ‘FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action’ (2018) 16.

¹⁰ Ethical Trading Initiative and Hult Business School, ‘Corporate Leadership on Modern Slavery: How have companies responded to the UK Modern Slavery Act one year on?’ (October 2016) 7.

¹¹ *Modern Slavery Act 2018*(No 30) (NSW) s 3.

¹² Department of Premier and Cabinet, Submission No. 1 to Legislative Council Standing committee on Social Issues, *Inquiry into the Modern Slavery Act 2018 (NSW) and associated matters*, June 2019, 3.

¹³ *Modern Slavery Act 2018*(No 30) (NSW) s 6.

- reporting requirements by way of an annual modern slavery statement;¹⁴
- publishing requirements upon an electronic register accessible by the public;¹⁵
- requirements for NSW government agencies to take reasonable steps to ensure the goods and services it procures are not the product of modern slavery practices;¹⁶
- criminal penalties for failing to report or publish a statement and for publishing false or misleading information in a statement;¹⁷
- the provision of support for victims of modern slavery facilitated by the Anti-Slavery Commissioner; and
- provisions implementing harmonisation with the Commonwealth Act as far as is possible.¹⁸

The Law Society commends the government for seeking to ensure the operability of the anti-slavery scheme through the draft regulations and draft amendment bill, which address purported legislative defects and aim to promote harmonisation with the Commonwealth Act. We are pleased to note that the amendments will not impact several positive aspects of the NSW anti-slavery scheme, including the establishment of the NSW Anti-Slavery Commissioner, 'reasonable steps' requirements on government agencies, and financial incentives for companies to report.

With regard to the transparency in supply chain measures at s 24 of the NSW Act, we note that the NSW Government has stated this requirement applies to "commercial organisations with an annual turnover between \$50 million and \$100 million"¹⁹, after which the Commonwealth Act would apply. However, the NSW Act and draft regulations only stipulate the lower, not the upper threshold. To assist businesses in determining whether they are required to report under the NSW Act or the Commonwealth Act, we recommend the NSW Act be amended to include a reference to the upper threshold.

Recommendation

The NSW Act should be amended to include reference to the upper reporting threshold for the transparency of supply chain provisions.

3. The effect of the anti-slavery scheme on business, including the supply chain reporting obligations under section 24 of the NSW Act

There are an estimated 1650 businesses that are either headquartered in NSW or have branches in the state and have annual turnover of between \$50 million and \$100 million.²⁰ Unless these businesses fall within one of the exemption categories in the NSW Act, they will be required to lodge a modern slavery statement to the Anti-Slavery Commissioner each financial year. The proposed anti-slavery scheme will have two core effects on businesses in NSW that are required to report. Firstly, businesses that fall within the criteria at s 24(1) of the Act will be subject to reporting requirements and penalties for non-compliance. Secondly, publication of modern slavery statements may affect the public's perception of a business.

¹⁴ *Modern Slavery Act 2018(No 30)* (NSW) s 24.

¹⁵ *Modern Slavery Act 2018(No 30)* (NSW) s 26.

¹⁶ *Modern Slavery Act 2018(No 30)* (NSW) s 25.

¹⁷ *Modern Slavery Act 2018(No 30)* (NSW) s 24(7).

¹⁸ NSW Government Department of Premier and Cabinet, 'Supply Chain Reporting Requirement for Business: Draft Modern Slavery Regulation 2019' (Explanatory Paper, April 2019) 3.

¹⁹ NSW Government Department of Premier and Cabinet, 'Supply Chain Reporting Requirement for Business: Draft Modern Slavery Regulation 2019' (Explanatory Paper, April 2019) 4.

²⁰ Department of Premier and Cabinet, Submission No. 1 to Legislative Council Standing committee on Social Issues, *Inquiry into the Modern Slavery Act 2018 (NSW) and associated matters*, June 2019, 6.

3.1. *Transparency of supply chain reporting requirements*

Businesses that fall within the definition of “commercial organisation” in the NSW Act will be required to publish a modern slavery statement each financial year. It is estimated that the cost of preparing a modern slavery statement will be \$21,950 for each reporting organisation.²¹

Businesses that fail to prepare and submit a modern slavery statement as required by the NSW Act, or knowingly publish a statement that includes false or misleading information, will be subject to penalties of up to \$1.1 million. While financial penalties provide an incentive for compliance, the Law Society suggests that they be utilised as an option of last resort. To this end, we recommend the Anti-Slavery Commissioner develop practical guidelines for businesses to refer to in preparing their modern slavery statements, as provided for by s 27 of the NSW Act.

We note that in setting out eligibility criteria, the NSW Act uses the term “turnover” while the Commonwealth Act uses the term “consolidated revenue”. Given the overlap between the two laws, it would be preferable for them to be aligned in terms of terminology and effect on business to the greatest extent possible.

We further note that the reporting requirement may have a secondary or ‘trickle down’ impact on many businesses operating in NSW with turnover below \$50 million, as larger businesses with which they contract will ask them about their approach to addressing modern slavery to satisfy due diligence requirements.

3.2. *Publication of modern slavery statements*

The proposed anti-slavery regime places two overlapping requirements on the Anti-Slavery Commissioner with regard to a public register of modern slavery statements. Section 26 of the NSW Act states that the Anti-Slavery Commissioner must keep a free, public register in electronic form identifying entities that disclose their goods or services are potentially a product of modern slavery. This model has been criticised as a “dirty list” that “may disincentivize business from acting responsibly and taking steps to identify slavery risks”.²² Clause 8 of the draft regulations requires the Anti-Slavery Commissioner to keep a register in electronic form of all modern slavery statements lodged with the Anti-Slavery Commissioner. To limit the potential for confusion, we recommend that a single modern slavery register be established. This register should be supported by reliable funding and designed to be accessible to – and searchable by – interested members of the public and civil society organisations.

Recommendations

- a) The NSW Government should, consider whether the term “turnover” in the NSW Act can be substitute for “consolidated revenue”, to align with the Commonwealth Act.
- b) The Anti-Slavery Commissioner should develop practical guidance material for businesses to refer to in preparing their modern slavery statements under the NSW Act.
- c) The NSW Act and draft regulations should be amended to require a single, comprehensive modern slavery register.

²¹ Explanatory memorandum, *Modern Slavery Bill 2018*, 35.

²² Amy Sinclair and Justine Nolan, ‘Developments in the Field, Modern Slavery Laws in Australia: Steps in the Right Direction?’ (2019) 0 *Business and Human Rights Journal*.

4. Intended application of the anti-slavery scheme with respect to charities and not-for-profit organisations, State Owned Corporations and local councils

Charities and not-for-profit organisations

Proposed sub-clause 10(4) of the draft regulations will exempt an organisation from the reporting requirements at s 24(2)-(7) of the NSW Act if the organisation:

- a) has an organisation constitution (however described) that prohibits the distribution of profits or property to its members, and
- b) does not conduct its affairs (including its affairs as trustee of any trust) so as to provide pecuniary gain for its members (within the meaning of the *Associations Incorporation Act 2009*), and
- c) is exempt from paying income tax under the *Income Tax Assessment Act 1997* of the Commonwealth.

In relation to a), we note there will be certain organisations that do not meet this requirement. In particular, this includes trusts, many of which will not have the required statement in the trust deed, including where the trust has been established through a will.

State-owned corporations

The Law Society supports the provision in the draft amendment bill that would treat state-owned corporations as non-government organisations and not government agencies. We suggest, however, that consideration be given to whether a state-owned corporation should be treated as a government agency where a Minister is directly responsible or accountable to Parliament for the acts or omissions of that state-owned corporation.

Local councils

The Law Society notes the position of the NSW Government that local councils do not fall within the scope of the NSW Act, despite evidence of an intention to the contrary.²³ We further note the NSW Government's statement that no amendments are proposed that would place a reporting or 'reasonable steps' requirement on local councils, however non-legislative approaches for local councils are being explored. The Law Society suggests that if a non-legislative approach such a code of practice is pursued, it should be developed in collaboration with local councils, to ensure that any approach is both rigorous and compatible with resourcing constraints of smaller or regional local councils.

Recommendations

- a) The criteria for charities and not-for-profit organisations contained in the draft regulations should be reviewed in light of the points raised in this submission.
- b) State-owned corporations should be treated as non-government organisations and not government agencies under the anti-slavery regime.
- c) Any approach to promote transparency in supply chains of local councils should be developed in collaboration with representatives from local councils, including smaller or regional local councils.

²³ Department of Premier and Cabinet, Submission No. 1 to Legislative Council Standing committee on Social Issues, *Inquiry into the Modern Slavery Act 2018 (NSW) and associated matters*, June 2019, 8.

5. The appropriateness and enforceability of Modern Slavery Risk Orders under section 29 of the NSW Act

The Law Society supports the proposed repeal of s 29 of the NSW Act, which provides for the making of Modern Slavery Risk Orders. As the NSW Government has noted, this section “presents significant legal, policy and practical challenges”.²⁴ Section 29 is broadly drafted and is unnecessary in light of existing broad powers to make Apprehended Personal Violence Orders (“APVOs”) under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

We do not, however, support the proposed alternative which would see certain modern slavery offences included in the definition of “offence of a sexual nature” in the *Crimes (High Risk) Offenders Act 2006* (NSW). We submit that the proposal is not adequately justified for the following reasons:

- The cohort of modern slavery offenders the amendment would impact – which appears to be those convicted for an offence under Div 10A of the *Crimes Act 1900* (NSW) – may be quite different from a typical high-risk sex or high-risk violent offender. In the event there is an overlap between the categories of offender, the existing high-risk offender regime would apply;
- One of the principle objects of the high-risk offender regime is the rehabilitation of offenders in custody. It is not clear what programmes and supports will be available specifically for modern slavery offenders;
- There is no evidence of the particular risk and/or levels of recidivism posed by convicted modern slavery offenders;
- For those involved in defending applications under the high-risk offender regime, including agencies such as Legal Aid, the expanded definition could have significant resourcing and implementation challenges; and
- There are other means by which a convicted modern slavery offender can be kept under supervision, including through: parole; APVOs; and, where sexual offending against a child is involved, sex offender registration.

Recommendations

- a) The proposed repeal of s 29 of the NSW Act should proceed.
- b) The proposed amendment to the definition of “offence of a sexual nature” in the *Crimes (High Risk) Offenders Act 2006* (NSW) is not supported.

6. The unintended consequences of drafting issues with the NSW Act, including with respect to the *Human Tissue Act 1983* (NSW) and the sale and supply of human tissue

The Law Society supports the proposed amendment to the NSW Act that would replace the reference to s 32 of the *Human Tissue Act 1983* (NSW) with references to offences in the Commonwealth Criminal Code relating to organ trafficking.

²⁴ Department of Premier and Cabinet, Submission No. 1 to Legislative Council Standing committee on Social Issues, *Inquiry into the Modern Slavery Act 2018 (NSW) and associated matters*, June 2019, 7.

Recommendation

The Law Society supports the proposed amendment to Schedule 2 of the NSW Act in order to avoid unintended consequences arising from the scope of s 32 of the *Human Tissue Act 1983* (NSW).

7. The risk of a possible constitutional challenge to current provisions in the NSW Act due to inconsistencies with the Criminal Code Act 1995 (Cth)

The Law Society supports the proposed amendments 93AB and 93AC of the NSW Act, and the proposed repeal of s 91HAA, to ensure alignment between the NSW Act and equivalent Commonwealth provisions.

8. Whether the passage of the *Modern Slavery Act 2018* (Cth) renders parts or all of the NSW Act unnecessary, or requiring of amendment to address inconsistencies or gaps

The Law Society is of the view that, notwithstanding the passage of the Commonwealth Act, the NSW Act remains a necessary and important response to the issue of modern slavery. The NSW Act will also help to reassure residents of NSW that items that the supply chains of products sold in the state are free of the scourge of modern slavery.

Reasons for maintaining the NSW anti-slavery regime include the following:

- Due to its lower reporting threshold of \$50 million per annum, the NSW Act captures up to 1650 entities that would not fall within the scope of the Commonwealth Act.
- The draft regulations promote harmonisation with the Commonwealth Act by providing that organisations that voluntarily report under the Commonwealth Act need not also comply with the NSW requirements.²⁵
- The inclusion of penalties at s 24 of the NSW Act represent an improvement on other similar legislation worldwide. Experts have observed that low rates of reporting under the UK's *Modern Slavery Act 2015* are a consequence, in part, of there being no pecuniary penalties for failing to report.²⁶
- The establishment of an Anti-Slavery Commissioner by the NSW Act is an important step which will help promote a coordinated response to modern slavery in NSW.

9. The preferred course of action to address the matters identified

The Law Society recommends that the NSW anti-slavery scheme should be brought into effect once issues identified during the Inquiry have been addressed. We further recommend that the scheme remain consistent with the UN Guiding Principles on Business and Human Rights.²⁷

10. Any other related matter

The Law Society recommends that the implementation of the NSW anti-slavery scheme be supported by a public awareness campaign. Due to the existence of the NSW and Commonwealth Acts, and the evolving terminology associated with the issue both laws seek to address, there is the risk of confusion among the business community and citizens. A

²⁵ Public Consultation Draft, *Modern Slavery Regulations 2019* (NSW), reg 10.

²⁶ Amy Sinclair and Justine Nolan, 'Developments in the Field, Modern Slavery Laws in Australia: Steps in the Right Direction?' (2019) 0 *Business and Human Rights Journal*, 5.

²⁷ United Nations Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations protect, respect and remedy framework' (2011) <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf>.

targeted public awareness campaign, ideally led by the Anti-Slavery Commissioner, would help to address confusion, support compliance, and drive a 'race to the top' for reporting entities.

Recommendation

The implementation of the NSW anti-slavery scheme should be supported by a public awareness campaign.

Thank you for the opportunity to contribute to the Inquiry. Questions may be directed in the first instance to _____, Principal Policy Lawyer, at _____ or _____

Yours sincerely,

Elizabeth Espinosa
President